No. 44156-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALEXIS J. SCHLOTTMANN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Lisa L. Sutton, Judge
Cause No. 11-1-01815-0

BRIEF OF RESPONDENT

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2. Whether defense counsel provided ineffective assistance of counsel by conceding, during the opening statement and closing argument, that the State could prove or had proven all the elements of two of twelve charges, and of a lesser included offense of a third count.

3. Whether the prosecutor committed misconduct in closing argument.

4. Whether the cumulative error doctrine applies to Schlottman's trial.

B. STATEMENT OF THE CASE.

The State accepts Schlottmann's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. Juror No. 1 did not withhold material information during voir dire and the court acted within its discretion when it declined to excuse the juror for cause.

Schlottman maintains that Juror No. 1 withheld material information during voir dire, and that when he disclosed to the court the nature of his experience with a possible attempted burglary of his own house, the court abused its discretion by denying

Schlottmann's motion to excuse the juror for cause. The facts contained in the record do not support those claims.

Schlottmann has set forth an extensive recitation of the facts regarding the juror in her Opening Brief at 11-13 and the State will repeat them as little as possible.

A criminal defendant has the right to be tried by a jury composed of "impartial, indifferent jurors." State v. Latham, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983). While jurors must be unbiased, it is not required that they be totally ignorant of the facts or the issues of the case. Id. at 64. When a juror deliberately withholds material information so that he may be seated on the jury, bias may be presumed. State v. Cho, 108 Wn. App. 315, 317, 30 P.3d 496 (2001). When a defendant seeks a new trial on the basis that a juror failed to disclose material information on voir dire, he or she "must show that (1) the juror intentionally failed to answer a material question and (2) a truthful disclosure would have provided a valid basis for a challenge for cause." State v. Boiko, 138 Wn. App. 256, 261, 156 P.3d 934 (2007). Because the conjuctive "and" is used, both prongs must be proven before the defendant is entitled to relief.

In Schlottmann's case, she cannot show that Juror No. 1 intentionally failed to disclose material information. Schlottmann writes extensively in her brief about the admonitions of the court to the venire that the members answer completely and honestly, and she points out the similarities between the damage to Juror No. 1's house and the facts of the crimes at issue in this trial. The record shows, however, that while the parties knew the facts of the case, *nobody told the jury venire.*

At the beginning of voir dire, the judge read the charging document to the venire. 4 RP 4-7.[1] The date of all the offenses was given as November 17 or 18, 2011. No address or other indication of geographical location was given. The charges were first degree burglary while armed with a firearm (Count 1), theft of a firearm (Count 2), second degree theft (Counts 4, 7, and 11), third degree malicious mischief by damaging Marian Finely's residence (Count 5), first degree burglary (Count 6), second degree malicious mischief for damaging the Winkelman residence (Count 8), residential burglary (Count 9), second degree malicious mischief for damaging the Japhet residence (Count 10), and second degree

[1] The State adopts Schlottman's references to the record; the volume containing voir dire and opening statements will be referred to as Volume 4 of the VRP and the three volumes of the trial transcript as they are designated by the court reporter.

possession of stolen property (Counts 12 and 13). Nowhere in any of the discussion during voir dire was there any mention of the area where these crimes occurred, no mention of a crowbar, no description of the damage to the various residences, and no discussion of what constitutes a burglary in any degree.

When the judge inquired if any of the potential jurors had had "an experience that is similar to the type of incident or events that were described," 4 RP 19, the venire didn't have much to go on. Juror No. 5 talked about being broken into; No. 16 told about her daughter being held at gunpoint, 4 RP 20; No. 27 said his or her house had been broken into in the last three weeks, 4 RP 20-21; No. 24 had experienced two vehicle prowls, 4 RP 21; No. 34 reported a residential burglary, 4 RP 21; No. 36 spoke of the house and vehicles being broken into, 4 RP 22; No. 42 had a vehicle stolen, 4 RP 22; someone had pulled a gun on No. 40, 4 RP 23; No. 19's relatives had "been broken into," 4 RP 23; and No. 28's niece had been burglarized, 4 RP 24.

Voir dire occurred on October 15, 2012, eleven months after the crimes at issue and approximately the same amount of time after the incident with the juror who ended up on the jury as Juror No. 1. There is no reason to expect that he would have connected

the marks on his own door with the kind of incidents underlying the charges against Schlottmann. Schlottmann insists that the juror deliberately withheld material information. The reasonable inference is that he simply did not connect what happened to him with the charges against her. It is also a reasonable inference that he did not remember the date of the damage to his own home and he probably consulted his own records when he went home after the first day of trial. On the first day of testimony Deputy Brian Brennan described the Finely burglary, including the address. 1 RP 7-25. Finely's neighbor, Emily McMason, testified about seeing one of the suspects taking a crowbar from the van and going into Finely's house. 1 RP 79-80.

First thing on the second day of trial, Juror No. 1 brought to the court's attention the fact that he lived in the same general vicinity as Finely and on November 10, 2011, his door had been damaged by something similar to a crowbar. 2 RP 109-12. At the time he was questioned about this matter, he still didn't know the addresses of the other burglaries. 2 RP 110.

It is obvious from this exchange that Juror No. 1 would have mentioned his experience had the parties given him sufficient information to make the connection. Once he did realize it, he

promptly reported it. Had he been deliberately withholding information so he would be seated on the jury, he would certainly have continued to keep this information to himself—it makes no sense that he would tell the court about it if he were trying to hide it.

"A prospective juror is not obligated to volunteer information or provide answers to unasked questions." Cho, 108 Wn. App. at 327. Nor should a juror be expected to divulge "similar experiences" when no one tells him what those experiences are.[2]

In order to obtain a new trial, Schlottmann must show that the juror not only deliberately withheld material information but that had he disclosed that information during voir dire she would have been successful with a challenge for cause. She cannot demonstrate that either.

Juror No. 1 told the court he believed he could be fair. 2 RP 111. Defense counsel asked questions about the damage to the juror's door, but did not inquire into his possible biases. 2 RP 112-13. Counsel further acknowledged that this incident did not rise to the same level as the experience of another member of the venire

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[2] Schlottmann herself demonstrates a confusion of terms when she states that Juror No. 5 was the only potential juror who answered that he has personally been a victim of a robbery. Appellant's Opening Brief at 12. In fact, Juror No. 5 described what was apparently a burglary ("I was broken into at Fort Bragg. . ."). 4 RP 19.

who was excused for cause. 2 RP 113. He said had he known this information during voir dire he would have made a challenge for cause, 2 RP 113, but making a challenge does not guarantee a successful challenge.

This juror said he believed he could be fair. His credibility is bolstered by the fact that he brought this matter to the attention of the court at all. He was clearly trying to be as open and above-board as possible. The question before the court was whether the juror could in fact be fair. As Schlottmann acknowledges, a court's decision to remove or not remove a juror for bias is reviewed for an abuse of discretion. State v. Rafay, 168 Wn. App. 734, 821, 285 P.3d 83 (2012). The decision of the court is given "substantial deference." Id. at 822. The trial judge is in the best position to evaluate the juror's candor and impartiality. State v. Elmore, 155 Wn.2d 758, 769 fn. 3, 123 P.3d 72 (2005).

> The trial judge is best situated to determine a juror's competency to serve impartially [because the judge] is able to observe the juror's demeanor and, in light of that observation, to interpret and evaluate the juror's answers to determine whether the juror would be fair and impartial.

State v. Rupe, 108 Wn.2d 734, 749, 743 P.2d 210 (1987) (citing Patton v. Yount, 467 U.S. 1025, 1039, 104 S. Ct. 2885, 81 L. Ed.

2d 847 (1984); Briley v. Bass, 750 F.2d 1238, 1246 (4th Cir. 1984); State v. Gosser, 33 Wn. App. 428, 434, 656 P.2d 514 (1982)).

Courts presume that prospective jurors respond honestly to questions during voir dire about circumstances that might affect their ability to decide a case impartially. *See* United States v. Rowe, 106 F.3d 1226, 1229 (5th Cir. 1997).

> Bias may be either actual or implied.
>
> > A challenge for cause may be made for either implied or actual bias. RCW 4.44.170. Actual bias is defined as the existence of a state of mind which satisfies the judge that the juror "cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). Implied bias, on the other hand, arises when a juror has some relationship with either party; with the case itself; or has served as a juror in the same or a related action. RCW 4.44.180.

Latham, 100 wn.2d at 63.

Implied bias will be found only in exceptional circumstances. Boiko, 138 Wn. App. at 260-61. In Cho, the court said that "nothing inherent in the experience or status of being a police officer . . . would support a finding of bias. A relationship with the government, without more, does not establish bias." Cho, 108 Wn. App. at 324. Nor do the circumstances of this juror establish implied bias. In Cho, the court did remand for an evidentiary hearing because (1)

the potential juror deliberately withheld his former employment information because he had previously been excluded from juries because of it, (2) when asked about favorable or unfavorable experiences with law enforcement, by either himself, family, or friends, he mentioned only a speeding ticket he had received, and (3) the juror told defense counsel he had convinced undecided jurors to convict. Cho, 108 Wn. App. at 320, 327-28, 329. At Schlottmann's trial, the juror did not deliberately withhold information; he did not realize it was relevant, and he did disclose once he became aware that it was. He did not, unlike the juror in Cho, wait until after the verdict and then inform defense counsel about the damage to his own house.

The record does not support a claim that Juror No. 1 was actually biased. Pry marks on his front door occurring within a few days of the date of the burglaries at issue in the trial and within "maybe a mile and a half," 2 RP 110, of his residence is not sufficient to indicate that he would vote to convict Schlottman in the absence of evidence beyond a reasonable doubt. Nor does he fit the definition of implied bias. He had no relationship with either party or the case itself, and he had never been a juror in a related action.

Schlottmann further argues that the court applied the wrong standard when it said, in denying Schlottman's motion to excuse Juror No. 1, "There was nothing that he said that rises to the level of the other people who were excused for cause who had similar experiences . . . ". The court was not necessarily saying that the bench mark was the other potential jurors who were excused. While the court failed to use the words "can be fair and impartial," its statement is essentially a way of saying there were reasons to believe that those other people could not be fair and impartial, but the circumstances here are different and there is not a reason to think that this juror cannot. An inartfully worded ruling is not per se an incorrect ruling.

The court did not ask the juror why he had not disclosed the information during voir dire because it was apparent from his own statements that until he heard the testimony during the first day of trial, he had no idea there was any reason to do so. Sclottmann asks this court to remand for an evidentiary hearing because Juror No. 1 "may have had a relationship to the case," and "his home may have been involved in this series of criminal transactions." Appellant's Opening Brief at 20. But all the available information was before the trial court at the time it denied her challenge for

cause. There is no new evidence to obtain, particularly nearly two years after the incident, and the explanation for the juror's delayed disclosure is apparent from the record. Schlottman does nothing more than speculate that the juror was biased, with no evidence to support that speculation. There is no need for an evidentiary hearing, nor did the court commit error.

> 2. Counsel for the defendant conceded guilt on two of twelve charges and a lesser-included offense for a third charge. Under the circumstances of this case, where the evidence of her guilt on those three counts was overwhelming, there was no ineffective assistance of counsel.

Schlottman maintains that her counsel was ineffective because he conceded to the jury that she was guilty of some charges. Schlottman misstates in her opening brief the charges to which her attorney conceded guilt. She claims that he admitted her guilt on seven of thirteen charges and specifically all five charges involving the Finely residence. Appellant's Opening Brief at 21, 28. Allthough Schlottman was charged with thirteen counts, CP 12-14, Count III, second degree unlawful possession of a firearm was dismissed during the trial and that charge was never read to the jury. 4 RP 4-7, 3 RP 345, 378. During his opening statement, counsel told the jury that the State would be able to prove "some of

these charges, and some of the charges involving Ms. Finely's home." 4 RP 98. During that statement, however, the only act he specifically admitted she did was enter the Finely residence, but did not concede to first degree burglary. 4 RP 98.

During closing argument, defense counsel argued extensively that although Schlottman had entered the Finely residence, she had no knowledge of, nor accomplice liability for, the theft of the gun, nor was she armed. 3RP 408-12. He conceded that Schlottman stole "expensive items," but not a firearm. 3 RP 409-10. Then he argued that the jury should find her guilty of the lesser included residential burglary, not first degree burglary. 3 RP 410-13; CP 77-78. He did not, as Schlottmann asserts, admit her guilt to the highest level offense. Appellant's Opening Brief at 29. He in fact, faced with overwhelming evidence that Schlottmann went into Finely's residence and came out carrying things in her hands, admitted to the least serious charges possible.

Defense counsel also conceded that the State had proved that Schlottmann, as an accomplice of Lockard, was responsible for the damage to Finely's door. 3 RP 410, 413. That charge, Count V, is a gross misdemeanor. CP 13. He conceded she had assisted Lockard in taking property from the Finely residence. 3 RP 408-10,

413-14. Second degree theft, Count IV, is a class C felony. CP 13. In all, then, counsel admitted Schlottmann's guilt to a third degree malicious mischief, second degree theft, and residential burglary, a lesser included offense of first degree burglary[3] with which she was charged. He vigorously denied that the evidence supported convictions for theft of a firearm (Count II, CP 12). 3 RP 409.

Addressing the charges concerning victims other than Finely, defense counsel argued that there was no evidence to connect Schlottmann with either the Japhet or Winkelman burglaries, the damage to their houses, or the thefts from those residences. CP 13-14, Counts VI, VII, VIII, IX. X, and XI; 3 RP 414-18, 424. He argued that she was not proven guilty of Count XII or XIII, two counts of possession of stolen property belonging to Japhet and Winkelman, CP 14-15, because of her tenuous connection to the van containing the property and the lack of evidence connecting it specifically to her. 3 RP 418-22, 424.

a. Ineffective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an

[3] First degree burglary is a class A felony. RCW 9A.52.020(2). Residential burglary is a class B felony. RCW 9A.52.025(2).

appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In re the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant must overcome the presumption of effective representation. Strickland, 466 U.S. at 687 A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an

ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

"The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688-689; *See* Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular

case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Prejudice occurs when but for the deficient performance, the outcome would have been different. Pirtle, 136 Wn.2d at 487.

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . [then] that course should be followed [first]." Strickland, 466 U.S. at 697.

Schlottman maintains that Washington courts find a defense attorney's concession of guilt to be a legitimate trial tactic only when admitting to a lesser charge than the one for which the defendant is on trial. Appellant's Opening Brief at 23. As noted above, regarding the charge of first degree burglary of the Finely residence, that is precisely what counsel did. Counsel was not required to consult with Schlottmann before doing so. State v. Silva, 106 Wn. App. 586, 596, 24 P.3d 477 (2001). However, arguing that the defendant is guilty of a lesser included charge is not the only time when admitting culpability to a charge constitutes legitimate trial tactics.

It may be good tactics to concede that some elements of a charge or that one of several charges has been proven. United States v. Swanson, 943 F.2d 1070, 1075-76 (9th Cir. 1991). This type of concession can be a reasonable trial strategy when counsel is attempting to gain credibility with the jury in order to obtain an acquittal on other charges. Silva, 106 Wn. App. at 597-98. Here counsel admitted Schlottmann's guilt only to the charges for which no reasonable juror would have believed her not guilty. He did so

to emphasize the difference between the State's proof of those charges compared to the State's proof of the other burglaries, and necessarily, the theft and malicious mischief charges accompanying them. *See, e.g.,* 3 RP 414. That strategy was successful to the extent that the jury convicted Schlottmann of residential burglary for the Winkelman residence rather than first degree burglary as charged. CP 109, 110. To the extent it was not successful, in that she was convicted as charged of all of the remaining counts, unsuccessful tactics are no less tactics, and cannot be the basis for a claim of ineffective assistance of counsel. "The requirement that counsel be effective is not a result-oriented standard. Counsel is required to be competent, but not necessarily victorious." Wiley v. Sowders, 647 F.2d 642, 648 (6th Cir. 1981).

Schlottmann cites to Swanson to support her argument that conceding guilt constitutes ineffective assistance of counsel. That case is distinguishable from Schlottmann's. Swanson was charged with one count of bank robbery. His attorney conceded during closing argument the only factual issues in dispute. Swanson, 943 F.2d at1071-72. Citing to United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984), the court concluded that Swanson's attorney had destroyed the adversarial character of the

trial. Swanson, 943 F.2d at 1074. Even where there is no possible available defense, counsel is expected to hold the State to its burden of proof. Id. at 1075, again citing to Cronic, 466 U.S. at 656-57, n. 19. The court went on to say, however, "We recognize that in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges." Id. at 1075-76.

In Schlottman's trial, her attorney clearly advocated vigorously for her interests in ten of twelve charges. He certainly held the State to its burden of proof on all charges by telling the jury not so much that Schlottmann was guilty but that the State had met its burden of proof.

Schlottmann further cites to Sowders, to support her argument. In that case, counsel arguing for the two defendants admitted their guilt to all of the charges. The court there held that "Counsel's complete concession of petitioner's guilt nullified the adversarial quality of this fundamental issue." Sowders, 647 F.2d at 650. Further, it found that if counsel intended to admit guilt, the defendant must give knowing consent. Id. But Sowders, like Swanson, involved a concession to all of the issues before the jury. That is a different situation than Schlottman was facing, where she

faced twelve counts and the evidence was overwhelming for three of them. By conceding those three, her attorney acquired enough credibility to argue that the State had not proved its case on the other charges by drawing attention to the difference in the quantity of evidence. Even the Sowder court, quoting Justice Harlan in Brookhart v. Janis, 384 U.S. 1, 8, 86 S. Ct. 1245, 1249, 16 L. Ed. 2d 314 (1966), said, "'A lawyer may properly make the tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval.'" Sowder, 647 F.2d at 648.

Schlottman complains that her attorney admitted that she was found in the vehicle with the stolen property. Since the evidence that she was in the vehicle when it was stopped only moments after the Finely burglary was incontrovertible, he could not very well argue that she wasn't. He did, however, argue extensively that Schlottmann had only a transitory connection with that vehicle, the location of the stolen property in the van, if known, did not implicate her, and that there was no proof that she possessed any of that property. 3 RP 419-23. As the court said in United States v. Bradford, 528 F.2d 899, 900 (9th Cir. 1975), "He did the best he could with a virtually impossible case."

Schlottman maintains that counsel's argument was a breach of his duty of loyalty such as to create a conflict of interest, citing to In re Pers. Restraint of Benn, 143 Wn.2d 868, 952 P.2d 116 (1998). Appellant's Opening Brief at 29-30. But, as she notes, it is a nonstrategic concession of guilt that constitutes a conflict of interest, and her counsel's concessions were clearly strategic. He did not act as an advocate against his client or effectively join the State in obtaining a conviction. Benn, 134 Wn.2d at 891. Counsel for Schlottmann provided a more than competent defense.

Finally, Schlottman cannot show any prejudice, even if counsel had been ineffective. The evidence of the three charges to which counsel conceded was so overwhelming that had he not conceded, the jury would certainly have convicted anyway. Where the outcome of the proceeding would be the same without the error, there is no prejudice. Pirtle, 136 Wn.2d at 487.

3. The prosecutor did not commit misconduct during closing argument. Even if one or two remarks were ill-advised, there was no prejudice.

Schlottmann cites to three remarks made by the prosecutor during closing arguments that she claims constitute prosecutorial misconduct resulting in prejudice. Appellant's Opening Brief at 30. All of the challenged statements are permissible argument.

A defendant who claims prosecutorial misconduct must first establish the misconduct, and then its prejudicial effect. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (citing to State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). "Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." Dhaliwal, 150 Wn.2d at 578. Prejudice will be found only when there is a "substantial likelihood the instances of misconduct affected the jury's verdict." Id.

Rebuttal argument is treated slightly differently than the initial closing argument. Even if improper, a prosecutor's remarks are not grounds for reversal when invited or provoked by defense counsel unless they were not a pertinent reply or were so prejudicial that a curative instruction would be ineffective. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994).

> As a general rule, remarks of the prosecutor, including such as would otherwise be improper, are not grounds for reversal where they are invited, provoked, or occasioned by defense counsel and where [the comments] are in reply to or retaliation for [defense counsel's] acts and statements, unless such remarks go beyond a pertinent reply and bring before the jury extraneous matters not in the record, or are so prejudicial that an instruction would not cure them.

State v. La Porte, 58 Wn.2d 816, 822, 365 P.2d 24 (1961).

While it is true that a prosecutor must act in a manner worthy of his office, a prosecutor is an advocate and entitled to make a fair response to a defense counsel's arguments. Id., at 87. *See also* State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758 (2005). A prosecutor has a duty to advocate the State's case against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). It is not error for the prosecutor to argue that the evidence does not support the defense theory. State v. Graham, 59 Wn. App. 418, 429, 798 P.2d 314 (1990).

A prosecutor has wide latitude in arguing inferences from the evidence. It is not misconduct to argue facts in evidence and suggest reasonable inferences from them. Unless he unmistakably expresses a personal opinion, there is no error. Spokane County v. Bates, 96 Wn. App. 893, 901, 982 P.2d 642 (1999).

A reviewing court first determines whether the challenged comments were in fact improper. If so, then the court considers whether there was a "substantial likelihood" that the jury was affected by the comments. Both the Sixth Amendment and Const.

art. 1, § 22 grant defendants the right to trial by an impartial jury, but that does not include the right to an error-free trial. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A conviction will be reversed only if improper argument prejudiced the defendant. There is no prejudice unless the outcome of the trial is affected. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Schlottmann moved for a mistrial after the jury had been excused to deliberate, based upon the prosecutor's remarks which she now challenges on appeal. 3 RP 439-41. A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. "A trial court 'should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000) (citing State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). In determining whether the trial court abused its discretion in denying a motion for mistrial, the court will find abuse only when no reasonable judge would have reached the same conclusion. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

a. The reason people commit burglaries.

During his closing argument, the prosecutor, while discussing the nature of the items taken during the three burglaries, said:

> They took similar items. They want jewelry, electronics, and they wanted that checkbook. Why do people burglarize houses? I mean, this probably isn't too hard of a concept. They want drugs and they want money. And money equals drugs or drugs equals money, one of the two. And they want things they can sell quickly ----

Schlottmann objected, a sidebar conference was held, and the court instructed the prosecutor to "go ahead." 3 RP 396.

It is not improper for a prosecutor to refer to matters within the common experience or knowledge of the jury. *See, e.g.* State v. Welker, 37 Wn. App. 628, 638 fn. 2, 683 P.2d 1110 (1984). It cannot be a surprise to anyone who reads or watches the news that drugs are a problem of epidemic proportions, and that stealing small, valuable items that can be quickly converted to cash is a common way of raising money. The court did not sustain Schlottmann's objection because it did not consider it inappropriate argument. 3 RP 441. It is true that there was no evidence presented that the two suspects stole property in an effort to obtain drugs. It is also true that because of that, it cannot fairly be said

that the remarks had a substantial likelihood of inflaming the jury so that it convicted in the absence of proof beyond a reasonable doubt. The remark about drugs might have been extraneous, but considering the totality of the evidence and the arguments, it did not alter the outcome of the trial.

Schlottman cites to State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993), for the proposition that references to drug related offenses are prejudicial. Appellant's Opening Brief at 34. In that case, Stith was on trial for possession of cocaine with intent to deliver. Id. at 416. During closing argument, the prosecutor said, "He was out of jail for a week and he basically was just resuming his criminal ways. He was just coming back and he was dealing again." Id. at 16. There had been no evidence of Stith's prior conviction for a drug related offense. Id. at 22. The court found the remark, in combination with another statement regarding probable cause, to be prejudicial even though the court gave a curative instruction. Id. at 22. "Taken together these comments not only implied that the trial was a useless formality because the real issues had already been determined, but also directly stated that Stith was out on the streets, dealing again." Id.

The character of the remarks of the prosecutor in Schlottmann's case, compared to those of the prosecutor in Stith's, is much different. The nature of the charges Schlottman faced was much different. What is prejudicial in one context is not necessarily prejudicial in every context, and there is no basis to believe that the prosecutor's remark here prejudiced Schlottman in the slightest. Schlottman also refers to State v. Ramos, 164 Wn. App. 327, 263 P.3d 1268 (2011), to support her argument that references to drugs in closing argument is prejudicial. Appellant's Opening Brief at 35. Ramos was on trial for unlawful delivery of cocaine. Ramos, 164 Wn. App. at 329. The court reversed because of a combination of closing argument and improper cross examination. Id. at 342. The argument had implied that Ramos was part of the illegal drug business because he recognized two police detectives. Id. at 341. It stands to reason that a reference to drugs in closing argument may be prejudicial when the defendant is on trial for drug offenses. Schlottman was not and there is no similarity to the facts of the cases to which she cites. She has not demonstrated either misconduct or prejudice.

b. Victimization and lack of conscience.

Schlottmann challenges as misconduct the comments of the prosecutor during closing argument that Lockard and Schlottmann were burglars and thieves with no conscience. Appellant's Opening Brief at 37-40, 3 RP 401. She contends that the prosecutor's statements were without support in the record.

As noted above, the prosecutor has wide latitude to draw reasonable inferences from the evidence. There was evidence that Schlottmann and Lockard had forcibly entered at least three homes while the residents were away and stolen a large quantity of personal property. It seems a fair inference from those activities that Schlottmann wanted to victimize people. It was not an unsupported expression of personal opinion by the prosecutor.

Schlottmann did not object to this comment. A defendant's failure to object to improper arguments constitutes a waiver unless the statements are "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Dhaliwal, 150 Wn.2d at 578. "Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on

appeal." 29. The absence of an objection by defense counsel "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

This comment, supported by the record, is not error. Even if it were, it was not so "flagrant and ill-intentioned" that a curative instruction would have been useless. There is no basis for reversal.

c. Failure to take responsibility.

Schlottmann also claims prosecutorial misconduct for these remarks concerning the Finely burglary and associated charges:

> [Defense counsel] says well—he told you at the beginning of this case, well, she doesn't contest that. Really? If she's not contesting it, why are we here talking about those particular charges? She never pled guilty to those charges. . . You still have to find her guilty of those charges, don't you? That's one of your jobs. It's what the court has instructed you to do. She didn't take responsibility for it. She's going to try to now—

3 RP 400. Defense counsel asked for a sidebar, and when argument resumed, the prosecutor moved on to another issue. 3 RP 400-01. In rebuttal, the prosecutor said:

> Again, Ms. Schlottmann surrounds herself with these things, but she wants to deny all of them. As I said, she's never taken responsibility for any of it.

Defense counsel objected, the court told the prosecutor to proceed, and he resumed:

> She's never taken responsibility for any of these crimes, but for [defense counsel] doing that for her now. But again, she wants to limit what her responsibility is, for obvious reasons.

3 RP 433.

Sclottmann maintains that the prosecutor was suggesting that she had a duty to plead guilty and that the jury had a duty to find her guilty. That mischaracterizes the statements and takes them out of context. In opening statement, defense counsel had said she that the State could prove some of the charges. 4 RP 97-98, 100. The prosecutor was discussing the evidence which proved she was guilty: "Eyewitnesses. Saw them do it." 3 RP 400. That led him into talking about the fact that she had essentially, in opening statement, admitted responsibility. The fact remained, however, that the charge was before the jury to deal with. She did not plead guilty. The point the prosecutor intended to make is not in the record because counsel requested a side bar and the subject was changed. It is apparent, however, that the prosecutor was not telling the jury it had a duty to convict, although based on defense counsel's statements during opening that would not have been

improper, but that it had a duty to deal with these charges because she did not, in fact, take responsibility. Schlottmann asserts that these remarks exceed the scope of the defense attorney's remarks, but she does not specify how that is so. It seems to be a direct response. She argues that her attorney's remarks did not call for a response, but she does not cite to any authority for the implication that the State cannot properly respond to any defense argument.[4]

The jury here was, as juries always are, instructed that the "lawyers' remarks, statements, and arguments are . . . not evidence," and must be disregarded if they were unsupported by the evidence or the instructions. CP 56. Schlottmann argues that the jury received that instruction before it heard argument. Appellant's Opening Brief at 46. That is true, but each member of the jury had a copy of the instructions to take into the deliberation room. 3 RP 348, 435. It is not clear what difference it makes that the instructions were read to the jury before closing arguments.

Schlottmann is correct that not all comments referring to a defendant's constitutional rights are impermissible. As long as the comments do not focus on the exercise of the constitutional right,

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[4] Schlottman again mistakenly claims that her attorney conceded to seven of the charges. Appellant's Opening Brief at 44. As noted earlier, it was three of the charges, and one of those was for a lesser included offense.

they do not infringe upon that right. State v. Gregory, 158 Wn.2d 759, 806-07, 147 P.3d 1201 (2006). Here the prosecutor was obviously addressing the disconnect between the opening statement and the defense arguments in closing, 3 RP 408, 410, 413-14, and the actions of the defendant. In the end, however, there is no reversible error, even if the statement was ill-advised, unless it affected the outcome of the trial. Given that counsel conceded those charges in his opening statement and closing argument, and that the evidence was overwhelming, there is no reasonable likelihood that, had the prosecutor not made these remarks, the outcome regarding those charges would have been different.

4. The cumulative error doctrine does not apply.

The cumulative error doctrine "is limited to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). That doctrine does not apply where there are few errors which have little, if any, effect on the result of the trial. State v. Lindsay, 171 Wn. App. 808, 838, 288 P.3d 641 (2012).

In Schlottmann's trial, the only error, and it was harmless, was possibly a remark of the prosecutor in closing argument. There is no cumulative error.

D. CONCLUSION.

Based upon the foregoing arguments and authorities, the State respectfully asks this court to affirm all of Schlottmann's convictions.

Respectfully submitted this 9th day of October, 2013.

Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief, on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of October, 2013, at Olympia, Washington.

Chong McAfee

THURSTON COUNTY PROSECUTOR

October 09, 2013 - 1:20 PM

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